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Ong Lock Soon v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B-05–115 OF 2006
SURIYADI, HASAN LAH AND AHMAD MAAROP JJCA
17 AUGUST 2011

C

Criminal Law — Dangerous drugs — Trafficking — Appeal against conviction — Trafficking in 821.9g heroin — Appellant caught at KLIA transit lounge while about to board flight bound for Australia — Physical possession and knowledge of drugs established — Presumption of trafficking invoked — Whether appellant only guilty of offence under s 21(6) of the Dangerous Drugs Act 1952 — Whether trial judge misdirected herself on burden of proof due to invoking or presumption of trafficking

D

E

Criminal Law — Dangerous Drugs Act — Trafficking — Drugs in transit — Drugs discovered on accused at transit lounge of airport — Whether accused to be charged under s 39B(1)(a) or s 21(6) of the Dangerous Drugs Act 1952 — Dangerous Drugs Act 1952 ss 21(6) & 39B(1)(a)

F

Criminal Law — Dangerous Drugs Act — s 37(da) — Trafficking — Presumption — Prejudice — Prosecution electing not to rely on s 37(d) and s 37(da) at the close of prosecution's case — Trial judge nevertheless invoking presumption under s 37(da) — Whether prejudicial to appellant

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The appellant ('Ong') was caught at Gate C16, Satellite Building, KLIA with three packets of heroin strapped to his forearms and abdomen. Ong was about to board a flight bound for Australia. He was charged with trafficking 821.9g of heroin, convicted and sentenced to death. Hence, this appeal by Ong. The learned trial judge found that Ong had physical possession and knowledge of the said heroin. The trial judge then invoked the presumption of trafficking under s 37(da) of the Dangerous Drugs Act 1952 ('DDA') and held that the prosecution had proved a prima facie case of trafficking against Ong. Learned counsel for Ong contended that even if Ong was found factually to be trafficking, the drug was found in the transit lounge and Ong was to board the aeroplane en route to Sydney. Hence, it was contended that Ong was only guilty of an offence under s 21(6) of the DDA. Learned counsel for Ong further submitted that at the close of its case, the prosecution elected not to rely on s 37(d) and s 37(da) of the DDA to prove its case against Ong. Despite that election by the prosecution, the learned trial judge after having found actual possession, had invoked s 37(da) of the DDA to find trafficking against Ong.

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Learned counsel contended that in doing so the learned trial judge had misdirected herself on the burden of proof placed on Ong and hence she did not evaluate the defence on a lighter evidential burden which she was obliged to do.

Held, dismissing the appeal and affirming the conviction and sentence:

(1) The emphasis under s 21(6) is 'any person who brings any dangerous drug into Malaysia in transit otherwise than in accordance with the provisions under section 21 of the DDA'. There was nothing in evidence to suggest that the drug found on Ong was drug which was brought in by someone, never left the airport premises, and was transferred to Ong at the airport premises to be taken out of Malaysia. There was nothing in the prosecution's case that could form a basis for any consideration of the argument that the drug in question was 'drug in transit'; *Public Prosecutor v Jorge Enrique Pellon Tellon* [1998] 4 MLJ 183 distinguished (see para 15).

(2) Ong had actual possession of the heroin in question, triggering the presumption of the trafficking under s 37(da) of the DDA. Ong had not succeeded in rebutting, on the balance of probabilities, the presumption in s 37(da) of the DDA (see para 17).

(3) Ong was not placed in a tactical disadvantage with resultant unfairness to him. In its opening address the prosecution said it would prove that upon the body examination of Ong by PW4, 15 packets containing the suspected drugs were found tied to Ong's body. Although the opening address did not refer to any presumption under the DDA, it did state that Ong not only had possession of the proscribed drugs but had trafficked it. In the trial, the evidence adduced by the prosecution against Ong was based on possession. So, the defence knew that the case against him was based on actual possession. The evidence of actual possession against Ong was overwhelming. There was no new basis for conviction (see para 40).

(4) The presumption of trafficking under s 37(da) of the DDA could be invoked against Ong. At the close of the prosecution's case, the learned trial judge made it clear that actual possession had been proven and that therefore the presumption of trafficking under s 37(da) of the DDA was activated. In other words, before embarking on his defence, Ong knew what the case against him was and the required evidential burden he was to meet. In the circumstances there was no question of Ong being prejudiced (see paras 43 & 44).

[Bahasa Malaysia summary

Perayu ('Ong') ditangkap di Pintu C16, Bangunan Satellite, KLIA dengan tiga paket heroin diikat kepada lengan dan badannya. Ong baru hendak menaiki

penerbangan yang menuju ke Australia. Dia didakwa mengedar dadah heroin seberat 821.9g disabit dan dihukum mati. Maka rayuan ini oleh Ong. Hakim perbicaraan yang bijaksana mendapati bahawa Ong mempunyai milikan fizikal dan pengetahuan mengenai heroin tersebut. Hakim perbicaraan kemudiannya membangkitkan anggapan pengedaran di bawah s 37(da) Akta Dadah Berbahaya 1952 ('ADB') dan memutuskan bahawa pendakwaan telah membuktikan kes prima facie pengedaran terhadap Ong. Peguam yang bijaksana untuk Ong berhujah bahawa walaupun Ong didapati secara fakta mengedar, dadah didapati di ruang menunggu dan Ong hendak menaiki kapal terbang dalam perjalanan ke Sydney. Maka ia dihujahkan bahawa Ong hanya bersalah terhadap kesalahan di bawah s 21(6) ADB. Peguam yang bijaksana untuk Ong selanjutnya berhujah bahawa pada akhir kesnya, pendakwaan memilih untuk tidak bergantung ke atas s 37(d) dan s 37(da) ADB untuk membuktikan kesnya terhadap Ong. Meskipun pemilihan tersebut oleh pendakwaan, hakim perbicaraan yang bijaksana selepas mendapati milikan sebenar, telah membangkitkan s 37(da) ADB untuk mendapati pengedaran terhadap Ong. Penguam yang bijaksana berhujah bahawa dalam berbuat demikian hakim perbicaraan yang bijaksana telah tersalah arah dirinya atas beban pembuktian yang diletakkan ke atas Ong dan maka beliau tidak menilai pembelaan atas beban keterangan yang lebih ringan yang mana dia bertanggungjawab untuk membuatnya.

Diputuskan, menolak rayuan dan mengesahkan sabitan dan hukuman:

(1) Penekanan di bawah s 21(6) adalah 'any person who brings any dangerous drug into Malaysia in transit otherwise than in accordance with the provisions under section 21 of the DDA'. Tidak terdapat apa-apa di dalam keterangan untuk mencadangkan dadah yang dijumpai di badan Ong adalah dadah yang dibawa oleh seseorang, tidak meninggalkan premis lapangan terbang, dan dipindahkan kepada Ong di premis lapangan terbang untuk dibawa keluar dari Malaysia. Tidak terdapat apa-apa di dalam kes pendakwaan yang boleh membentuk asas untuk apa-apa pertimbangan penghujahan bahawa dadah yang dipersoalkan adalah 'drug in transit'; *Public Prosecutor v Jorge Enrique Pellon Tellon* [1998] 4 MLJ 183 dibeza (lihat perenggan 15).

(2) Ong telah mempunyai milikan sebenar heroin yang dipersoalkan, mencetus anggapan pengedaran di bawah s 37(da) ADB. Ong tidak berjaya dalam mematahkan, atas imbangan kebarangkalian, anggapan dalam s 37(da) ADB (lihat perenggan 17).

(3) Ong tidak diletakkan dalam keadaan tidak mengguntungkan taktikal dengan mengakibatkan ketidakadilan kepadanya. Dalam pernyataan pembukaannya pendakwaan menyatakan ia akan membuktikan bahawa atas pemeriksaan badan Ong oleh PW4, 15 paket mengandungi dadah yang disyaki dijumpai diikat ke badan Ong. Walaupun pernyataan

pembukaan tidak merujuk kepada apa-apa anggapan di bawah ADB, ia telah menyatakan bahawa bukan sahaja mempunyai milikan dadah yang diharamkan tersebut tetapi mengedarnya. Pada masa perbicaraan, keterangan yang dikemukakan oleh pendakwaan terhadap Ong adalah berdasarkan milikan. Oleh itu, pembelaan tahu bahawa kes terhadapnya adalah berdasarkan atas milikan sebenar. Keterangan mengenai milikan sebenar terhadap Ong adalah kukuh. Tidak terdapat asas baru untuk sabitan (lihat perenggan 40).

(4) Anggapan pengedaran di bawah s 37(da) ADB boleh dibangkitkan terhadap Ong. Pada akhir kes pendakwaan, hakim perbicaraan yang bijaksana telah menjelaskan bahawa milikan sebenar telah dibuktikan dan oleh itu anggapan pengedaran di bawah s 37(da) ADB dibangkitkan. Dalam perkataan lain, sebelum memulakan pembelaannya, Ong tahu mengenai apakah kes terhadapnya dan beban keterangan yang dikehendaki yang perlu dipatuhinya. Dalam keadaan ini tidak terdapat persoalan mengenai Ong diprejudis (lihat perenggan 43 & 44).]

Notes

For cases on drug, see 4 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 341–353.
For cases on trafficking, see 4 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 191–274.

Cases referred to

Andy bin Bagindah v PP [2000] 3 MLJ 644, CA (refd)
Dato Mokhtar bin Hashim v PP [1983] 2 MLJ 232, FC (refd)
Gooi Loo Seng v PP [1993] 2 MLJ 137; [1993] 3 CLJ 1, SC (refd)
Ng Kwok Chun & Anor v PP [1993] 1 SLR 55, CA (refd)
PP v Chia Leong Foo [2000] 6 MLJ 705, HC (refd)
PP v Jorge Enrique Pellon Tellon [1998] 4 MLJ 183, CA (distd)
PP v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393; [2006] 1 CLJ 457, FC (refd)
PP v Sa'ari bin Jusoh [2007] 2 MLJ 409, FC (folld)

Legislation referred to

Dangerous Drugs Act 1952 ss 2, 6, 21, 21(6), 37(d), 37(da), 39A, 39B, Part V

V Sithambaran (Ruebin Kumar with him) (Sitham & Associates) for the appellant.
Tetralina bt Ahmad Fauzi (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Ahmad Maarop JCA:

INTRODUCTION

[1] The appellant, Ong Lock Soon ('Ong') was caught at Gate C16, Satellite

Building, KLIA with three packets of heroin strapped to his forearms and abdomen. Ong was about to board flight MH123 bound for Sydney Australia. He was charged in the High Court with trafficking 821.9g of heroin, convicted and sentenced to death. He preferred an appeal to this court.

THE PROSECUTION'S CASE

[2] On 28 February 2002, Ahmad Syawal bin Shamsir ('PW4'), a security officer of the Malaysia Airport Bhd, who was also an auxiliary police officer, was on duty at the Departure Gate C16 of the Satellite Building, KLIA with his colleague Constable Mohd Sharil Nazreen bin Mamat ('PW6'). PW4's job was to check on passengers who were about to board flight MH123 bound for Sydney, Australia, to ensure that no dangerous items were carried on board the aeroplane. After passing through Gate C16, passengers for flight MH123 would wait in the holding area before boarding the aeroplane. At about 8.30pm Ong went through the walk through metal detector. After Ong walked through that detector, PW4 conducted a routine body check on him. Ong was wearing a long – sleeved shirt and a pair of jeans. PW4 began frisking Ong's body by holding Ong's right arm. PW4 felt something soft on that arm. He called PW6 and then both of them took Ong to the examination room which was located about 10 metres from the place where the initial check was conducted. In the examination room, PW4 asked Ong to take off his shirt. Ong did so, and PW4 saw that something was attached to both of Ong upper arms with what appeared to be a blue and white tape. PW4 unwound the tape around Ong's right arm and found underneath it a transparent plastic packet containing white substance which PW4 suspected to be dangerous drugs. PW4 asked PW6 to contact their superior officers as well as the airport narcotics police officers, in response to which ASP Maidu Abu Bakar ('PW7') the KLIA Head of The Narcotic Unit and one Chief Inspector Azhar came to the examination room. PW4 handed over the packet of white powder to PW7. PW7 directed PW4 and PW6 to take Ong to the police station at the main terminal building (MTB) of the KLIA which PW4 and PW6 did. PW7 and C/Inspector Azhar went along with them. On arrival at the examination room at the police station at the MTB, PW7 handed back the packet of white power to PW4. While PW7 and C/Inspector Azhar waited outside the room, PW4 and PW6 conducted further body search on Ong. PW4 found two more transparent plastic packets containing white powder on Ong. They were:

(a) one packet, on Ong's left upper arm, covered with white and blue adhesive tape which was wound around the arm; and

(b) another bigger packet, against Ong's abdomen which was held in place by blue and white adhesive tape.

[3] PW4 then lodged a police report and handed Ong over as well as all the

exhibits recovered from him to the investigation officer, Chief Inspector Lee Chee Yong ('PW11'). The exhibits recovered from Ong's body were sent to the Chemistry Department for analysis. The chemist — Nazarudin bin Mohamed @ Ibrahim ('PW9') certified that the white substance found in the three transparent plastic packets recovered from Ong's body contained a total of 821.9g of heroin, a dangerous drug as defined under the Dangerous Drugs Act 1952 ('DDA').

[4] At the close of the prosecution's case, the learned trial judge found (and in our view rightly) that on the evidence of PW4, PW8, PW9 and PW11, the substance produced in court in packets P45, P48 and P51 was the substance found in the packets strapped to Ong's upper arms and abdomen when he was detained by PW4 and PW6. We find that PW4, who recovered the three packets (P43, P46 and P49) from Ong's body had marked them with his signatures before handing them over to PW11. PW4 was able to identify those exhibits from the markings made by him. PW11 had in turn upon receipt of the exhibits from PW4, made his own markings on them. These markings had enabled him to identify the exhibits in court. The markings made by PW4 and PW11 had also enabled PW8 and PW9 to identify the material exhibits in court. In addition, we found that the prosecution had called as witnesses all the persons through whose hands the exhibits passed, and all of them had positively identified all the material exhibits. We find no break in the chain of evidence relating to the exhibits. There is no doubt in our mind as to the identity of the incriminating exhibits in this case. We are satisfied that the white substance in the three plastic packets examined and analysed by PW9 was the same substance from the same plastic packets recovered from Ong's body by PW4 on the night in question.

[5] The learned trial judge also found on the evidence of PW9 that the three packets found on Ong's body contained 821.9g of heroin. We are satisfied that the learned trial judge did not err in arriving at that finding. PW9 had given evidence on his qualification and experience. We find him to be a competent witness who possessed the necessary credentials and expertise to analyse the white substance in the three packets found on Ong. PW9 had given evidence on how he had carried his analysis of the incriminating exhibits including the various tests done by him. There is nothing inherently incredible about PW9's evidence. The learned trial judge was right in accepting PW9's evidence on his examination and analysis of the incriminating exhibits as well as his eventual conclusion. There is no doubt in our mind that the white substance in the three packets recovered from Ong's body contained 821.9g of heroin, a dangerous drug under the DDA.

[6] On the evidence before him, the learned trial judge then found that Ong had physical possession of 821.9g of heroin at the time and place stated in the

charge and that he had knowledge of the said heroin in his physical possession. Having thus found that Ong had actual possession of the heroin in question (without the aid of the presumption under s 37(d) of the DDA), she invoked the presumption of trafficking under s 37(da) of the DDA. She was therefore satisfied that the prosecution had proved a prima facie case of trafficking against Ong as stated in the charge against him.

DECISION

[7] Before us learned counsel for Ong confined his submission to two grounds which for convenience will be discussed under the following headings:

(a) applicability of s 21(6) of the DDA; and

(b) the learned trial judge's failure to appreciate the burden of proof placed on Ong as a result of the alleged election by the prosecution not to rely on s 37(da) or 37(d) of the DDA.

APPLICABILITY OF S 21(6) OF THE DDA

[8] This is the issue which arose for our consideration following the first ground of learned counsel's submission which appeared to be the substantive ground relied upon by him.

[9] The thrust of learned counsel submission was that even if Ong was found factually to be trafficking, it was undisputed that the proscribed drug was found in the transit lounge, and that he was to board the aeroplane en route to Sydney. He contended that on those facts Ong was only guilty of an offence under s 21(6) of the DDA. In support he relied on *Public Prosecutor v Jorge Enrique Pellon Tellon* [1998] 4 MLJ 183. Elaborating on this submission, learned counsel argued that at the close of the prosecution case, the reason given by the learned trial judge for not considering the applicability of s 21(6) of the DDA or the *Pellon*'s case appeared at para (43) of her ground of judgment (p 268, *jilid* 3 of the appeal record):

> At the close of the prosecution case, in the case before me, there was nothing in evidence to suggest that the drug found on the accused was drug which was brought in by someone, never left the airport premises, and was transferred to the accused at the airport premises to be taken out of Malaysia.

[10] Learned counsel argued that at the close of its case the prosecution gave similar reasons why s 21(6) of the DDA and the *Pellon*'s case did not apply when it submitted as follows:

(a) Keterangan ini (iaitu dan negara mana dadah tersebut datang) seperti yang termaktub di bawah s 21(1) haruslah dibuktikan terlebih dahulu, sebelum

kesalahan di bawah sub-s (6) terjadi. Ini adalah seperti yang dinyatakan dalam kes *Pellon* tersebut di ms 192. Selanjutnya keterangan ini tidaklah boleh dibuat secara inferens atau agak-agak mungkin berlaku tetapi mestilah berdasarkan keterangan yang memang telah sedia ada dalam kes pendakwaan.

(b) … tiada keterangan dalam kes pendakwaan yang menunjukkan tertuduh telah membawa dadah tersebut dan luar negara atau tertuduh telah berjumpa dengan orang lain (yang membawa dadah dan negeri lain) dan kemudiannya telah melekatkan pada badan tertuduh.

[11] Learned counsel then argued that the learned trial judge accepted that submission by the prosecution. He contended that based on the submissions of the prosecution and the learned trial judge's finding as aforesaid, the present case clearly fell within the ambit of s 21(6) of the DDA and the *Pellon*'s case. Referring to the evidence in the present case, learned counsel said that in his defence Ong testified that he received the packets from Ah Thong in the toilet at Gate C16 and that he was en route to Sydney. He contended that on those facts the present case fell squarely within s 21(6) of the DDA and the *Pellon*'s case. He argued that to interpret the true purpose and application of the offence under s 21(6) of the DDA one must appreciate the meaning of the words 'in transit' used there under which was defined under s 2 of the DDA. He submitted that if dangerous drugs were sent from any country and brought into Malaysia by air for the sole purpose of being carried to another country, then the drugs could be said to be on transit. He contended that in the context of the present case, the drugs were in transit. It was brought into Malaysia from Hong Kong by air for the sole purpose of being brought to another country. For reasons which we will explain in a moment, we cannot accept the submission of learned counsel.

[12] The argument that the drugs found on Ong that night were the drugs in transit was also raised in the High Court at the close of the case for the prosecution.

[13] Section 21(6) of the DDA provides:

(6) Any person who brings any dangerous drug into Malaysia in transit otherwise than in accordance with the provisions of this section shall be guilty of an offence against this Act, and shall be liable on conviction to a fine not exceeding twenty thousand ringgit or to imprisonment for a term not exceeding five years or to both.

[14] Under s 2 of the DDA, 'in transit' means taken or sent from any country and brought into Malaysia by land, air or water (whether or not landed or transhipped in Malaysia) for the sole purpose of being carried to another country either by the same or another conveyance. In the *Pellon*'s case, Pellon the accused, a Peruvian, was on a flight from Buenos Aires on 24 November

A 1996 and this was evident from his airline ticket (P26) issued by Malaysia Airlines. He arrived by Malaysia Airlines flight number MH202 and landed at Terminal One, Sultan Abdul Aziz Shah Airport (LTSAAS). The Court of Appeal found that he was obviously in transit, which was indicated by the top portion of the special pass issued to him on 26 Novemebr 1996 on which his B arrival flight No 'MH202' was written. Indeed it was not disputed that he was on transit. He was to leave for Den Pasar on 26 November 1996 by Malaysian Airline flight No MH715 departing at 9.20am. This was proven by his airline ticket (P26) and his boarding pass (P23). The court found further evidence to show that he did not intend to enter West Malaysia as provided by P26 which C stated that he departed Buenos Aires for Kuala Lumpur on MH202 on 24 November 1996 at 8.35pm and landed at Terminal One LTSAAS. He was to depart from Kuala Lumpur almost immediately upon arrival. Further, his passport was not endorsed for entry into Malaysia. At about 8.25 am on 26 November 1996, Pellon walked through the 'Walk Through Detector' at D Departure Gate C16 of Terminal One LTSAAS, where, upon a 100% body search conducted on him by PW5 (except inside his shoes), nine packages were found strapped to his inner short pants. The chemist later confirmed the nine packages to contain 1.846.4g of cocaine. This formed the subject matter of original second amended charge against Pellon under s 39B of the DDA. Pellon E was then taken to Balai Polis Damansara Utama where before being placed in the police lock-up, a body examination was conducted on him, in the course of which two more packages were found in his shoes. The chemist confirmed that the two packages contained 414.8g of cocaine. This formed the subject matter of the first amended charge under s 39B against Pellon. At the close of the F prosecution's case, the learned High Court judge amended the said charges against Pellon to charges for offences under s 21(6) of the DDA. On appeal, it was contended by the public prosecutor that in view of the quantity of cocaine, the offence of trafficking had been committed. In his judgment, speaking for this court, Lamin Mohd Yunus PCA said:

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> Our Dangerous Drugs Act 1952 defines the term 'in transit' as found in s 2 thus:
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> 'In transit' means taken or sent from any country and brought into Malaysia by land, air or water (whether or not landed or transhipped in Malaysia) for the sole purpose of being carried to another country either by the same or another
>
> H conveyance;
>
> 'In transit' means taken or sent from any country and brought into Malaysia by land, air or water (whether or not landed or transhipped in Malaysia) for the sole purpose of being carried to another country either by the same or another conveyance;
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> I Of course as we have pointed out it is an offence for anyone to export from Malaysia (s 19) or import into Malaysia (s 20) any dangerous drug without being in possession of a valid authorisation or licence. *It is equally an offence for anyone who 'brings any dangerous drug into Malaysia 'in transit' otherwise than in accordance with the provisions of s 21.* By definition a drug 'in transit' means 'taken or sent from any

country and *brought into* Malaysia' by land, air or water 'for the *sole* purpose of being carried to another country'. To qualify for the drug to be 'in transit', it must come from a country outside Malaysia 'for the *sole* purpose of being carried to another country'. In the terms of the 'purpose' being 'solely' for carriage to another country, it must mean that there shall not be any local distribution or consumption of the drug by any local resident or anyone at all within Malaysia. To be guilty for an offence in transit under sub-s (6) of s 21 there must be a breach of the provisions of sub-s (1) of the said section. Perhaps it may be of interest to note that the Act makes no express mention as to whether the person in possession of the drug must also be 'in transit' in the context of the immigration laws. Perhaps the word 'bring' appearing in sub-s (1) is capable of giving such an interpretation. However this was not a subject for contest in the present case, for it was not disputed that the accused before us was clearly 'in transit'. *Now to offend against sub-s (1), the person who brings the dangerous drug is not in possession of a valid export or import authorisation. In other words it is not accompanied with a valid export authorisation from a foreign country exporting it to another country outside Malaysia and at the same time it is also without a valid import authorisation from the other country.* Sub-s (2) on the other hand merely gives the relevant Minister or any officer properly authorised by him the power to seize and detain the drug in transit if he has 'reasonable grounds for believing' that the accompanying authorisation or diversion certificate is false or that it has been obtained by fraud or wilful misrepresentation of a material particular. If after investigation, he is satisfied that the authorisation is valid or that it has not been obtained by froud or misrepresentation he shall then release the drug. Sub-s (3) gives the Minister or any authorised officer the power to seize and detain the drug if it is not accompanied with a valid authorisation or diversion certificate and that the drug comes from a country not a party to the convention. While sub-s (4) stipulates that if the drug in transit requires storage for the time being, it shall only be 'stored and dealt with' on the direction of the Minister and it can only be moved in accordance with a removal licence granted under s 22.

In the present case, the drug was not accompanied with any form of authorisation papers, and there was no evidence that the drug was physically being distributed anywhere in the airport before the arrest or for the purpose of distributing locally. He was found in possession of the drug when he was about to board the aircraft that was bound for Den Pasar. The learned deputy even suggested that as the drug was found hidden on the body of the accused, he must have intended to traffic in the drug. There is no such presumption in the Act however. The Act neither stipulates, nor describes the manner by which the drug is to be brought or carried into country. Perhaps it may even be argued that because the accused had the drug hidden he did not want it to be detected because he wanted solely for the purpose of carrying it to another country in this case (Indonesia). So there was no intention to traffic in Malaysia.

The next question is whether the presumption of trafficking under s 37(da) of the Act is attracted in view of the amount involved. When a dangerous drug is 'in transit' in our view the amount is irrelevant because it is completely a different kind of act and therefore a different kind of offence. It is an offence of being 'in transit' without being accompanied with a valid authorisation. The amount of the drug involved ought not and should not make any difference as to the character of the act. The very language determines the issue. As we have earlier observed that the meaning of being

> 'in transit' is for the 'sole purpose' of being carried to another country and therefore Malaysia will not be a country where the drug will be distributed and consumed and as such the presumption of trafficking cannot arise. Perhaps there is wisdom in the legislature for having incorporated the offence of being 'in transit' because realising that the local populace will not suffer the consequence of distribution and consumption at the hands of the carrier, the carrier need not suffer the stringent application of our law. To deprive him of the drug by seizure accompanied by a small penalty would be more than sufficient.

[15] So, clearly, the emphasis under s 21(6) is '*any person who brings* any dangerous drug *into Malaysia* in transit otherwise than in accordance with the provisions under section 21 of the DDA'. That is the gravamen of the offence under s 21(6) of the DDA which was called in aid by Ong in defence of the trafficking charge against him. It is equally clear that the facts of *Pellon*'s case are materially different from the facts of this case as established by the evidence adduced up to the close of the prosecution's case. It is therefore not surprising that the learned trial judge made the following finding at the close of the prosecution's case:

> At the close of the prosecution case, in the case before me, there was nothing in evidence to suggest that the drug found on the accused was drug which was bought in by someone, never left the airport premises, and was transferred to the accused at the airport premises to be taken out of Malaysia. In this respect the facts differed from the case of *Jorge Enrique Pellon Tellon*. In that case, even during the prosecution case there was no dispute that the accused was on a flight from Buenos Aires to Indonesia via Kuala Lumpur. He was only transit in Kuala Lumpur, and was due to leave Malaysia almost immediately upon arrival. He never left the airport.
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> FINDING
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> I was therefore satisfied that there was nothing in the prosecution's case that could form a basis for any consideration of the argument that the drug in question was 'drug in transit' in the same manner as in the case of *Jorge Enrique Pellon Teilon*.

[16] We agree with her.

[17] Thus, at the close of the prosecution's case, the learned trial judge found that Ong had actual possession of the heroin in question (without the aid of the presumption under s 37(d) of the DDA), triggering the presumption of the trafficking under s 37(da) of the DDA. Pellon was presumed to be trafficking of the said heroin until the contrary was proved. As rightly held by the learned trial judge here the burden then was on Ong to rebut the said presumption on a balance of probability. This brings us to the defence case.

THE DEFENCE CASE

[18] Upon being called upon to enter on his defence, Ong gave evidence

under oath. The substance of his defence is as follows. Ong testified that he worked as a debt collector as well as a bodyguard. As a bodyguard he worked for 'Datuk' and rich men in Malaysia and sometimes abroad. Sometime in the year 2000, he was introduced to one Ah Hee by his friend Ah Tat. Ah Hee was a football bookie. After knowing Ah Hee and on his behest, Ong collected some of the debts owed to him. Later, Ah Hee introduced Ong to his friend — Huan Choo. In January 2002, Ah Hee asked Ong to go with Huan Choo to Australia as Huan Choo's bodyguard and to assist Huan Choo collect betting debts owed to Huan Choo. Ah Hee wanted Ong to go to Australia during the Chinese New Year in 2002 but the trip was postponed to 28 February 2002 because Ong wanted to celebrate the Chinese New Year. In the morning of 28 February 2002, Ong was in Penang. Later, he left Penang, went to a supermarket in Bukit Mertajam and waited for Ah Hee there. Ah Hee then came with a friend and the three of them went by car to Kuala Lumpur. They arrived in Kuala Lumpur at about 3pm and Ah Hee took Ong to a small hotel at Jalan Alor. Ah Hee told Ong that Huan Choo would meet Ong at the check-in counter of the KLIA. Later, Ong left the hotel alone by taxi for KLIA. He arrived at KLIA at 7.15pm. When he did not meet Huan Choo at the check-in counter, Ong telephone Ah Hee. Ah Hee told him to check in first and that Huan Choo would meet him at the transit lounge. Ong claimed that he checked in, obtained his boarding pass, went through the security guard at the entrance of the departure area, and then went through the immigration autogate as well as a customs check point. While he was on the aerotrain to the satellite building, Ong received a call from Huan Choo. Huan Choo told Ong that he could not go with Ong to Sydney because his mother was seriously ill and he had to be with her in Bukit Mertajam. Huan Choo said he would meet Ong in Sydney two days later. Huan Choo also asked Ong to do something for him. Huan Choo told Ong that his friend — Ah Thong was due to arrive from Hong Kong en route to London. Ah Thong was supposed to hand over to Huan Choo some Chinese Herbs in powder from. Since he was not able to be at KLIA that day, Huan Choo asked Ong to take the Chinese herbs from Ah Thong and then take it to Australia with him. The herbs was meant for Huan Choo's relative in Australia who was suffering from brain cancer. Huan Choo asked Ong to hide the herbs because according to Huan Choo, the Australian immigration was quite strict. Huan Choo told Ong that Ah Thong was in the transit lounge and that he would leave for London from that lounge. Ong agreed to take the herbs from Ah Thong. Ong did not know Ah Thong. Huan Choo asked Ong to describe to him the clothes Ong wore. According to Ong, Huan Choo gave Ah Thong his (Ong's) telephone number and a description of the clothes he wore.

[19] Continuing his evidence, Ong said when he was walking from the aerotrain to Gate C16, he received a call from Ah Thong, asking him where he was. Ong replied that he was on his way to Gate C16. Ah Thong asked Ong to wait at a toilet near Gate C16. Ong met Ah Thong there. Ah Thong told Ong to follow him into the toilet because according to Ah Thong, the herbs could

not be handed over to Ong openly. They then went into a toilet cubicle, and there Ah Thong took out the packets of Chinese herbs and secured them on to Ong's body. Ong said, the process of securing the packets to his body took about 5–6 minutes. Ah Thong told Ong that if the packets were found by the security or customs personnel, they would be confiscated but Ong could still proceed on his journey. Ong then went on to line up at Gate 16. What happened subsequent to that was as narrated in the prosecution case.

[20] Ong denied that he knew that the packets contained heroin. He believed that he was carrying Chinese herbs.

[21] In examining Ong's defence, the learned trial judge considered the time taken from the moment Ong passed through the immigration auto gate on the night in question to the time he lined up in front of Gate C16. A number of activities including the fastening of the three packages onto his body took place between these two points of time. From the evidence of PW5 the immigration officer on duty at immigration auto gate at MTB on the day in question and the immigration document 'Sistem Kawalan Imigresen' (P52), Ong passed through the immigration autogate at 8.16pm. Ong claimed that he was lining up at Gate C16 at 8.40pm. According SP4 and SP6, Ong was first checked at Gate C16 at about 8.30pm. The learned trial judge found that according to Ong's version, 24 minutes after passing through the immigration auto gate, Ong lined up at Gate C16. Now, according to Ong's version, between these two activities he did the following:

(a) he walked to the aerotrain station at the MTB;

(b) he rode the train to the satellite building;

(c) he walked to the toilet near Gate C16;

(d) he met Ah Thong;

(e) he entered a cubicle in the toilet;

(f) he saw Ah Thong take out the three packets of 'Chinese Herb';

(g) he allowed Ah Thong to secure the packets around his upper arms and abdomen using adhesive tapes (which must also have been bought by Ah Thong);

(h) he put his shirt back on; and

(i) he walked out of the toilet and lined up at Gate C16.

[22] The learned trial judge considered the question whether all those activities could take place within 24 minutes? She then considered the evidence by PW5 that it would take between 15–20 minutes to get to the Satellite building from the MTB using the aerotrain. She found that this evidence was

not challenged by the defence. She also considered the evidence by PW4 that he took 40 minutes to remove the packets from Ong's left arm and abdomen. This evidence was also not challenged. She then concluded that it would not be humanly possible for Ong to be able to complete all the activities as aforesaid within the 24 minutes:

> If it took 40 minutes to remove two packets, how long would it take to place 3 packets such that the packets were completely covered by the tape and were secure? Surely it would take longer than the 40 minutes SP4 took to remove 2 packets.
>
> Finding
>
> Having considered SP5's unchallenged evidence about the time one needs to get to the Satellite building from the MTB and SP4's also unchallenged evidence about the time he took to remove two of the packets, it would not be possible for the Accused to pass the immigration autogate at 8.16 pm, get to the satellite building, meet up with Ah Tong, get into the cubicle at the toilet, take off his shirt, have the packets secured to his body, put his shirt back on, and walk to Gate 16 to line up there by 8.40 pm.

[23] Having considered the evidence on record ourselves, we find no reason to disagree with her finding. In our view securing the three packets in place onto Ong's body within the confine of the space in the toilet cubicle occupied by two persons alone would take longer than the 40 minutes taken by PW4 to remove two packets in the examination room at the police station at the MTB.

[24] In assessing Ong's evidence the learned trial judge also asked (and in our view rightly) the questions regarding the existence of Huan Choo, the whereabouts of Ah Hee — another mysterious figure who 'disappeared' from the scene after sending Ong to a small hotel in Jalan Alor Kuala Lumpur, and the necessity of checking into that hotel instead of going straight to KLIA from Bukit Mertajam, after all according to Ong, the three of them (Ah Hee, Ah Hee's friend and Ong) travelled in a car from Bukit Mertajam. So what really was the necessity of checking into the hotel for a mere three hours? In her judgment the learned judge said:

> *Did Huan Choo exist? Where was Ah Hee? Why the hotel at Jalan Alor?*
>
> According to the accused, every arrangement until the phone call he received on the aerotrain, had been made by Ah Hee. Ah Hee was the one who asked him to go to Sydney to help Huan Choo. Ah Hee met the accused at Bukit Mertajam. Ah Hee took him to Kuala Lumpur. Ah Hee told him that he would stay at the Pacific Hotel in Sydney. It was Ah Hee's friend who was supposed to meet them at the hotel in Sydney. It was Ah Hee who told him to check in first. Was there in fact a Huan Choo who was supposed to go to Sydney with the accused?

A The accused was taken to a hotel in Jalan Alor when he arrived in Kuala Lumpur at pm. He later took a taxi to the KLIA. What happened to Ah Hee and his friend, also Ah Hee, who brought the Accused all the way from Bukit Mertajam to Kuala Lumpur? Why didn't *they* take him to KLIA?.

B The accused arrived in KLIA about 7.15 pm. The trip by taxi from Jalan Alor to KLIA could not have taken less than one hour. He must have checked out by 6.15 pm. Why check into a hotel for only three hours? Why could he not be taken straight to KLIA? Was it because the three packets were in fact delivered and bound to his body at the hotel in Jalan Alor?.

C *Finding at the close of defence case*

Upon considering the evidence given by the accused, I was not satisfied that he had succeeded in rebutting, on the balance of probabilities, the presumption in para 37(da) of the DDA.

D

[25] We have no reason to disagree with her. The conclusions of the learned judge were based on the credibility or otherwise of the prosecution witnesses and of Ong, in respect of which, her views is entitled to great respect especially as here she had given cogent reasons for her findings. An appellate court is E always slow to interfere in findings of fact made by a trial judge (see *Andy bin Bagindah v Public Prosecutor* [2000] 3 MLJ 644). In order to reverse the decision of the learned trial judge on such matters we must, not merely entertain doubt whether his decision was right, but be convinced that it was wrong (see *Dato' Mokhtar bin Hashim v Public Prosecutor* [1983] 2 MLJ 232 at F p 275). Having carefully scrutinised the evidence on record, and having carefully examined the judgment of the learned trial judge, and for reasons which we have set out in this judgment, we are satisfied that the learned trial judge did not err.

G **[26]** The learned trial judge also considered the argument regurgitated on behalf of Ong that the drugs were in transit in the light of Ong's evidence. At that stage of the case, learned counsel for Ong submitted that even if Ong had knowledge of the nature of the drugs tied to his body, at most he was guilty of an offence under s 21(6) of the DDA. Again the *Pellon*'s case was cited in H support of that submission.

[27] Elsewhere in this judgment we have set out the facts in the *Pellon*'s case. To reiterate, in the *Pellon*'s case, Pellon was the person who brought the proscribed drugs into Malaysia, and that he was caught in the process of I exporting the drugs out of the country to Indonesia. This court found that both Pellon and the drugs were therefore clearly in transit. In fact there was no dispute in that case that they were in transit. The facts in the instant case are materially different. Here, unlike the *Pellon*'s case, on Ong's own evidence, the proscribed drugs was brought into the country by Ah Thong with its intended

final destination being Australia. Thus, it came as no surprise that the learned trial judge held that even if Ong's story was to be believed, the decision in the *Pellon*'s case was not applicable to the case before her. This was what she said:

> In the case of *Jorge Enrique Pellon Tellon*, the accused was the one who brought into the country the drug in question. Both the drug and the accused were clearly in transit, their final destination being Indonesia. In the case before me, if the accused's story were to be believed, the drug was in transit, having been brought into the country by Ah Tong, with its final destination being Sydney, Australia. However, it was the accused who was in the process of exporting it from Malaysia to its final destination. Sub-s 21(6) of the DDA, which formed the basis for the decision in the case of *Jorge Enrique Pellon Tellon*, is clearly not the relevant provision in the case before me. I was therefore of the view that the decision in the case of *Jorge Enrique Pellon Tellon* was not binding on me in this case.

[28] We agree with her conclusion.

[29] In our view, that conclusion by the learned trial judge was sufficient to support her finding that Ong had not succeeded in rebutting, on the balance of probabilities, the presumption of trafficking under s 37(da) of the DDA. However, there was an additional reason given by the learned trial judge to explain why in her view s 21(6) of the DDA did not apply. According to her, after the enactment of s 39B and the insertion of the definition of 'trafficking' in the DDA, the control mechanism in Part V of the DDA including the provision under s 21(6) was only meant for the purpose of overseeing the importation/exportation of dangerous drugs intended for legitimate purposes as allowed under the Single Convention, and also for the purpose of overseeing acts affecting the drugs (intended for legitimate purpose) while in transit. According to her, the insertion in 1983 of the presumption section under s 37(da) into DDA and the provision of the mandatory death penalty for trafficking offence underscored Parliament's earlier intention which was demonstrated by the 1975 amendment to DDA providing a more stringent of control for dangerous drugs meant for illicit purpose. She gave the following reasons for her view. Part V of the DDA was enacted to give effect to Malaysia's obligation under article 31 of the Single Convention on Narcotic Drugs 1961 ('the Single Convention') to which Malaysia is a state party. Under article 39 of the Single Convention, each State Party is empowered to enact more stringent measures to control narcotic drugs. In 1975 Malaysia enacted the Dangerous Drugs (Amendment) Act 1975 which provides for the offence of trafficking as well as the definition of 'trafficking'. As was evident from the speech of honourable Minister in introducing the Bill in the Dewan Rakyat on 8 April 1975, among the reasons for the amendment was the increase in the export of dangerous drugs from Malaysia to other countries. How then do we reconcile the provision in Part V of the DDA with the definition of trafficking and s 39B

itself? She opined that the answer to the question was provided by the Single Convention itself. In the learned trial judge's view:

> In relation to the importation and exportation of narcotic drugs, article 31 pursuant to which Part V of the DDA was enacted, provides for the regime necessary to ensure that drugs imported or exported meet the requirements of the importing country for the legitimate purposes allowed under the Convention. If Part V of the DDA is closely scrutinised, it is clear that it contains the mechanism which this country is obliged to put in place to control and supervise the importation and exportation of narcotic drugs for medical and scientific purposes as allowed under the Convention, and dealings with such drugs while in transit.
>
> The mechanism in Part V was adequate to control the entry and exit of dangerous drugs which were meant for legitimate purposes but did not have the necessary authorisation or obviously they were no longer adequate by 1975. By inserting s 39B and the definition of 'trafficking' into the DDA in 1975, Parliament made it clear that it wanted a separate and more stringent means of controlling the movement of drugs meant for illicit purposes, as a state party is allowed to do under article 39 of the Single Convention.

[30] The predecessor of the DDA was the Dangerous Drugs Ordinance 1952 (the DDO). The DDO was amended several times until today. It was revised in 1980 from which point it assumed the name DDO. To ensure conformity with the provisions of the Single Convention, a number of amendments were made to the DDO by the Emergency (Essential powers) Ordinance No 82 of 1971. In 1972, the Emergency (Essential powers) Ordinance No 82 of 1971 was repealed by the Dangerous Drugs (Amendment) Act 1972 (Act 112). At the same time Act 112 amended the DDO in the same manner specified in the Schedule thereto. Part V of the DDO was maintained. In tabling the bill in the *Dewan Rakyat*, the then honourable Minister of Health emphasised that the amendment was necessary to bring the DDO in accord with the Single Convention of which Malaysia was a State Party since 1967:

> Tuan Speaker, saya mohon untuk membentangkan suatu Rang Undang-undang untuk mengekalkan Ordinan Dharurat (Kuasa-kuasa Perlu) Bil. 82 tahun 1971 yang telah diisytiharkan oleh Duli Yang Maha Mulia Sen Paduka Baginda Yang di-Pertuan Agong di bawah kuasa-kuasa dharurat kepada satu undang-undang yang kekal. Rang Undang-undang ini iaitu untuk meminda beberapa seksyen tertentu Ordinan Dadah-dadah Berbahaya 1952 supaya:
>
> (a) Ordinan Dadah-dadah Berbahaya sejajar dengan peruntukan-peruntukan di dalam 'Single Convention on Narcotic Drugs 1961' yang mana Malaysia adalah salah sebuah negara anggotanya. 'The Single Convention 1961' adalah mewakili langkah umum terbesar dan perjanjian antarabangsa berhubung dengan menguatkan dan membaiki system kawalan antarabangsa mengenai dadah-dahah narkotik dalam mana Malaysia telah memberi kerjasama yang sepenuhnya pada semua masa. Konvensyen ini telah diluluskan dalam bulan

Disember 1962 oleh Perhimpunan Besar Bangsa-bangsa Bersatu sejajar dengan Artikel 41 Konvensyen itu. Konvensyen itu adalah berkuatkuasa dan 1 Januari 1965 kerana bilangan tandatangan-tandatangan yang perlu iaitu 40 di bawah Konvensyen itu telah pun diterima sebelum 1 Januari 1965. Kerajaan Malaysia telah menyampaikan surat persetujuannya dengan Setiausaha Majlis Bangsa-bangsa Bersatu dalam bulan Julai 1967.

(b) Untuk menyediakan langkah kawalan yang lebih ketat dan memandangkan kecenderungan pengambilan dadah secara haram bertambah, memperuntukkan hukuman-hukuman yang lebih berat bersabit dengan kesalahan-kesalahan terhadap Ordinan ini.

[31] According to the training material of the Single Convention, the Single Convention aims to restrict the use of narcotic drugs to medical and scientific purposes and to prevent their diversion and abuse:

The Single Convention is the result of the recognition by the United Nations of the fact that the adequate provision of narcotic drugs for medical purposes is indispensable for the welfare of mankind, as well as of the fact that drug addiction is a worldwide social and economic threat. Therefore, *the Single Convention aims to restrict the use of narcotics drugs to medical and scientific purposes and to prevent their diversion and abuse, while at the same time ensuring their availability for legitimate purposes.* It includes control measures over the cultivation of plants that serve as sources of raw material of narcotic drugs, provisions regarding the obligations of national authorities in the application of control measures over the production, manufacture, trade, and distribution of narcotic drugs, as well as provisions for the medical treatment and rehabilitation of addicts.

The Single Convention also emphasizes the role of the International Narcotics Control Board (INCB) *in ensuring a balance between the supply of and demand for narcotic drugs for medical and scientific purposes and helping to prevent the illicit drug cultivation, production, manufacture, traffic and use.* The Single Convention stresses the need for cooperative and coordinated international action in dealing with the problems associated with drug abuse.

[32] The aforesaid aim is clear from the preamble to the Single Convention which states:

The Parties,

Concerned with the health and welfare of mankind,

Recognizing that the the medical use of narcotic drugs continues to be indispensable for the relief of pain and suffering and that adequate provision must be made to ensure the availability of narcotic drugs for such purposes,

Recognizing that addiction to narcotic drugs constitutes a serious evil for the individual and is fraught with social and economic danger to mankind,

Conscious of their duty to prevent and combat this evil, Considering that effective measures against abuse of narcotic drugs require co-ordinated and universal action,

A Understanding that such universal action calls for international co-operation guided by the same principles and aimed at common objectives,

Acknowledging the competence of the United Nations in the field of narcotics control and desirous that the international organs concerned should be within the framework of that Organization,

B

Desiring to conclude a generally acceptable international convention replacing existing treaties on narcotic drugs, *limiting such drugs to medical and scientific use, and providing for continuous international co-operation and control for the achievement of such aims and objectives.*

C Hereby agree as follows:

[33] The aim to restrict the use of narcotic drugs to medical and scientific purposes is also evident from article 4 of the Single Convention which provides:

D

GENERAL OBLIGATIONS

The parties shall take such legislative and administrative measures as may be necessary:

E (a) To give effect to and carry out the provisions of this Convention within their own territories;

(b) To co-operate with other States in the execution of the provisions of this Convention;

F (c) *Subject to the provisions of this Convention, to limit exclusively to medical and scientific purposes the production, manufacture, export, import, distribution of, trade in, use and possession of drugs.*

[34] According to the training material of the Single Convention article 31
G of the Single Convention contains special provisions regarding international trade of narcotic drugs. Each country must participate in the control of international trade by controlling its exports and imports of narcotic drugs. Article 31 contains provisions which require a license regime for the authorization of export and import of substance under the control of the
H Convention. Regarding article 31, in *Ng Kwok Chun & Anor v Public Prosecutor* [1993] 1 SLR 55 the Singapore Court of Criminal Appeal made the following germane remarks:

The spirit of the Convention as regards illegal trade in controlled drugs is
I represented by the provisions of art 31 which, where relevant, read:

10 Consignments of drugs entering or leaving the territory of a party not accompanied by an export authorisation shall be detained by the competent authorities.

11 A party shall not permit any drugs consigned to another country to pass through

its territory, whether or not the consignment is removed from the conveyance in which it is carried, unless a copy of the export authorisation for such consignment is produced to the competent authorities of such party.

…

14 The provisions of paras 11–13 relating to the passage of drugs through the territory of a Party do not apply where the consignment in question is transported by aircraft which does not land in the country or the territory of transit. If the aircraft lands in such territory, those provisions shall be applied so far as circumstances require.

These provisions make it abundantly *clear that the Convention imposes an obligation on its signatories to ensure that their territory is not used as a transit point for the illegal movement of drugs.*

[35] The object of preventing the improper use of drugs or their diversion for illicit purposes could also be discerned from the provisions of article 32 of the Single Convention:

(1) The international carriage by ships or aircraft of such limited amounts of drugs as may be needed during their journey or voyage for first-aid purposes or emergency cases shall not be considered to be import, export or passage through a country within the meaning of this Convention.

(2) Appropriate safeguards shall be taken by the country of registry to prevent the improper use of the drugs referred to in paragraph 1 or their diversion for illicit purposes. The Commission, in consultation with the appropriate international organizations, shall recommend such safeguards.

(3) Drugs carried by ships or aircraft in accordance with paragraph 1 shall be subject to the laws, regulations, permits and licences of the country of registry, without prejudice to any rights of the competent local authorities to carry out checks, inspections and other control measures on board ships or aircraft. The administration of such drugs in the case of emergency shall not be considered a violation of the requirements of article 30, paragraph 2 b).

[36] In the light of the foregoing reasons we agree with the learned trial judge that the provisions under Part V of the DDA is intended only for the purpose of governing the importation and exportation of dangerous drugs for legitimate purposes (namely medical and scientific purposes as provided under the Single Convention), and for the purpose of governing acts affecting such drugs while in transit. In other words regarding the specific defence ventilated before us, we are of the view that the provisions relating to dangerous drugs in transit under Part V of the DDA are intended to apply to dangerous drugs in transit for legitimate purposes. Even if Ong's evidence is accepted, the bringing of the proscribed drugs into Malaysia for the purpose of being carried to Australia by Ong for the use of Huan Choo's relative was not covered by the transit provisions under Part V of the DDA including s 21(6). The acceptance

of learned counsel contention would result in Malaysia being a very attractive and potential safe — transit haven for drug traffickers from all over the world. Such a consequence is to our mind absurd, contrary to international comity and certainly never intended by the legislature.

FAILURE TO APPRECIATE THE BURDEN OF PROOF ON ONG AS A RESULT OF THE ELECTION BY THE PROSECUTION NOT TO RELY ON S 37(da) OR 37(d) OF THE DDA

[37] The thrust of learned counsel submission on this point is as follows. At the close of its case, the prosecution elected not to rely on s 37(d) and s 37(da) of the DDA to prove its case against Ong. Despite that election by the prosecution, the learned trial judge after having found actual possession, invoked s 37(da) of the DDA to find trafficking against Ong. Learned counsel contended that in doing so the learned trial judge had misdirected herself on the burden of proof placed on Ong and hence she did not evaluate the defence on a lighter evidential burden which she was obliged to do. It was argued that the failure of the learned trial judge to accept the submission by the prosecution that it was not relying on any of the presumptions which she must, resulted in the bar being raised against Ong to secure an acquittal, because according to learned counsel, a higher evidential burden was placed on Ong — namely to rebut the prosecution's case on the balance of probability instead of a lower burden of raising a reasonable doubt. This, learned counsel argued was a misdirection which went to the root of the matter warranting appellate interference. He contended that the nett effect of that misdirection was that Ong had lost the chance which was fairly open to him of being acquitted. Much reliance was placed by learned counsel on *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393; [2006] 1 CLJ 457, *Public Prosecutor v Chia Leong Foo* [2000] 6 MLJ 705 and *Gooi Loo Seng v Public Prosecutor* [1993] 2 MLJ 137; [1993] 3 CLJ 1. The passage in the judgment of the Federal Court in *Public Prosecutor v Mohd Radzli bin Abu Bakar* which was relied on by learned counsel is as follows:

> Before we conclude, there is one final matter that requires mention. In the present case, the application by the learned trial judge of the double presumption formula appears in the main to have been caused by the prosecution's failure to specify whether it proposed to prove actual trafficking or whether it proposed to rely on the presumption under s 37(da) of the Act. We find this a common occurrence in prosecution for trafficking under the Act. Trial judges and defence counsel are most often left guessing until the very end of the trial as to whether the prosecution is relying on direct evidence to prove trafficking or whether they seek to rely on the presumption under s 37(d) or s 37(da) of the Act.
>
> In our view, the problem is easily solved by the prosecution intimating to the defence and to the court at the first available opportunity if its case is one of actual trafficking or if it intends to rely on a presumption to establish trafficking and, if the latter be

the case, to identify the precise presumption. This could be done either before the commencement of the trial or as part of the opening speech and would go a long way in assisting the defence in directing its cross examination along appropriate lines and thereby avoiding a waste of the court's time. See *Public Prosecutor v Chia Leong Foo* [2000] 6 MLJ 705; [2000] 4 CLJ 649, applying *Public Prosecutor v Okonkwo & Anor* [1993] 3 SLR 610.

[38] We regret to say that for reasons which we will set out in a moment, we are unable to accept learned counsel submission. First, the remarks made by the Federal Court which was relied upon by learned counsel was obiter. It was not the ratio of the case. What was said in the remark was not the reason why the appeal by the public prosecutor was dismissed and the majority of the Court of Appeal decision in substituting the respondent's conviction to an offence of possession under ss 6 and 39A of the DDA was upheld. Secondly, the remark made by Augustine Paul J (as he then was) in *Public Prosecutor v Chia Leong Foo* [2000] 6 MLJ 705) which was relied upon by learned counsel was also obiter. What was said therein was not the reason for the decision in that case. The opinion about the use of presumptions expressed by the learned judge was not an issue raised for the court's decision in that case. The opinion was expressed by learned judge in passing when he was discussing the meaning of presumptions. Thus both the cases relied upon by learned counsel, though useful, were not conclusive in support of the point advocated by him. Indeed, when asked by us, learned counsel replied that he could not find any specific authority to show that failure of a learned trial judge to accept the prosecution's election such as alleged by learned counsel in this case would be fatal to the prosecution's case.

[39] In our view a more useful and illuminating authority on the point raised is *Public Prosecutor v Sa'ari bin Jusoh* [2007] 2 MLJ 409. In that case, the Federal Court held that a verdict could be founded on a basis not indicated by the prosecution in its opening address. But it must be done in such a way so as not to place the accused at a tactical disadvantage with resultant unfairness to him. In that case the prosecution's opening address referred only to an act of selling dangerous drugs. There was no reference to possession of dangerous drugs by the accused. In his judgment, speaking for the Federal Court Augustine Paul FCJ said:

In short the determinative factor is whether the defence has had the opportunity to meet the new basis for conviction. A similar test is also applicable when the prosecution leads evidence to which no reference has been made in the opening address. It follows that it cannot be automatically excluded as done in cases such as *Public Prosecutor v Kang Choo Heng & Anor* [1991] 3 CLJ 2574 and *Pendakwa Raya v Norfaizal* [2004] 1 AMR 310 without any consideration of the element of prejudice. Where the procedures just described have not been followed the burden will be on the defence to show the manner in which it has been prejudiced followed with a reply by the prosecution.

A The objection of learned counsel to the use of the presumption of trafficking against the accused was not supported by particulars of the prejudice that the defence may suffer. Neither did the prosecution comment on this aspect of the defence submission. The task therefore falls on us to determine whether the accused will suffer any prejudice if the presumption of trafficking is invoked against the accused. The activation of the presumption of trafficking under s 37(da) of the Act requires B proof of actual possession of the dangerous drugs by the prosecution. In the opening address there is no mention of possession of the dangerous drugs by the accused. It only refers to the arrangement made between the accused and PW7 for the sale of the drugs. However, the evidence adduced by the prosecution shows that the accused was in actual possession of the drugs. The notes of evidence reveal that C witnesses who testified on this issue were cross-examined by the defence. When the accused was called upon to enter his defence he declined to recall any of the prosecution witnesses. In this regard the notes of evidence at *jilid* 2 p 128 reads as follows:

D (*Peguam tertuduh memaklum ia tidak bercadang memanggil semula mana-mana saksi pendakwa*).

The examination-in-chief of the accused was wholly on the fact that the bag which contained the dangerous drugs was carried by one Ismail and not him. In his cross-examination he denied that he negotiated for the sale of the drugs with PW7. The examination-in-chief of his witness Mohd Saupi bin Jusoh (DW2) was also only on E the question of possession. The submission of the defence at the end of the case was also on the issue of possession of the bag containing the dangerous drugs. The facts that the accused cross-examined the prosecution witnesses on the issue of possession; that he was given an opportunity to recall witnesses for the prosecution and that his defence was one of negating possession mean that he will not be F prejudiced as a result of a conviction based on possession. Accordingly the presumption of trafficking under s 37(da) of the Act can be invoked against the accused as there is evidence of actual possession.

G **[40]** Reverting to the instant appeal, we do not think Ong was placed in a tactical disadvantage with resultant unfairness to him. Unlike in *Public Prosecutor v Sa'ari bin Jusoh* where there was evidence of negotiations between the accused and the agent provocateur (PW7) for the sale of the proscribed drugs leading to the accused carrying the drugs to the appointed place of delivery and delivering the same to PW7, in the present appeal, in its opening H address (p 280, Vol 3 of the appeal record), the prosecution said it would prove that upon the body examination of Ong by PW4, three packets containing the suspected drugs were found tied to Ong's body. Although the opening address did not refer to any presumption under the DDA, it did state that Ong not only had possession of the proscribed drugs but had trafficked it. In the trial, the I evidence adduced by the prosecution against Ong was based on possession. In the cross-examination of PW4 and PW6 (the material witnesses for the prosecution), the fact that three packets were found on Ong was not seriously challenged. What was challenged was the witnesses' identification of the incriminating exhibits and the place where they were recovered from Ong's

body. So, the defence knew that the case against him was based on actual possession. That was the basis of the case against Ong from the start to the end. The evidence of actual possession against Ong was overwhelming. There was no new basis for conviction. In the High Court, in his submission of no case to answer learned counsel for Ong (the same counsel who appeared before us) submitted four grounds on which he argued there was no prima facie case made out against Ong. The first and the fourth grounds were on the identity of the exhibits and the chemist evidence, respectively. On the second ground which is more relevant to the issue under discussion, learned counsel made the following submission:

> (2) Arises from decision in case *Toh Su Kuan v Public Prosecutor* [2005] 3 CLJ 740.
>
> The gist of this submission is even if accused is found in custody of the incriminating exhibits, therefore presumption arises for possession, there cannot be a double presumption for application of s 37(da) for the offence of trafficking.
>
> Rujuk kes *Toh Su Kuan* di muka surat 744 dan 745
>
> — Possession has to be with mens rea. You have to know the nature of the drug.
>
> Since there is no evidence, either by confession, etc, then what he was carrying maybe merely an illegal substance and s 37(da) cannot apply.
>
> In *Toh*'s case appeal was allowed.

[41] The submission was therefore very much on possession and the prohibition against the use of double presumptions.

[42] In his submission on the third ground (headed 'in transit'), learned counsel conceded that the drug was found on Ong but he (Ong) was in transit:

> Since subject matter is drug, defence must convince court that drug was found when the accused was in transit.

[43] We are of the view that in such a situation, following *Public Prosecutor v Sa'ari Jusoh* , the presumption of trafficking under s 37(da) of the DDA could be invoked against Ong. Having said that we must add that more importantly, at the close of the prosecution's case, when she called upon Ong to enter on his defence, the learned trial judge made it clear that actual possession had been proven and that therefore the presumption of trafficking under s 37(da) of ADD was activated:

> Keputusan:
>
> Setelah meneliti keterangan yang dikemukakan dan mendengar hujah kedua-dua pihak, mahkamah mendapati prima facie pemilikan sebenar telah dibuktikan. Oleh itu, anggapan di bawah s 37(da) Akta Dadah Berbahaya berbangkit. Dengan itu

juga mahkamah mendapati pendakwaan telah membuktikan kes prima facie terhadap tertuduh atas pertuduhan yang dihadapkan terhadapnya. Oleh itu tertuduh dipanggil membela diri atas pertuduhan yang dihadapkan terhadapnya di bawah s 39B Akta Dadah Berbahaya.

[44] In other words, before embarking on his defence, Ong knew what the case against him was and the required evidential burden he was to meet. In our judgment in the circumstances there was no question of Ong being prejudiced.

[45] Having carefully scrutinised the evidence on record and having carefully examined the judgment of learned trial judge, we are entirely satisfied that Ong's conviction is safe. In the result the appeal is dismissed. The conviction and sentence imposed on Ong are affirmed.

Appeal dismissed and conviction and sentence affirmed.

Reported by Kanesh Sundrum